FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1979

NO. 79-1458

HENRY E. BILLINGSLEY, et ux,

Petitioners,

vs.

THOMAS S. LAWSON and
J. EDWARD WHITE, SUBSTITUTE TRUSTEES, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE COURT OF SPECIAL APPEALS OF MARYLAND

CARLTON M. GREEN
5303 Baltimore Avenue
Hyattsville, Md. 20781
(301) 864-6070
Attorney for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1979

NO.

HENRY E. BILLINGSLEY, et ux,

Petitioners,

vs.

THOMAS S. LAWSON and
J. EDWARD WHITE, SUBSTITUTE TRUSTEES, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE COURT OF SPECIAL APPEALS OF MARYLAND

PRELIMINARY STATEMENT

Petitioners, Henry E. Billingsley and Ann M. Billingsley pray that the Writ of Certiorari issue to review a judgment of the Court of Special Appeals of Maryland, entered on October 18, 1979, in the case styled, Henry E. Billingsley, et ux vs. Thomas S. Lawson and J. Edward White, Substitute Trustees, et al, No. 273 and 459, September Term, 1979, which among other things held the Maryland foreclosure

procedure to be constitutional. A petition for writ of certiorari to the Court of Special Appeals filed in the Court of Appeals of Maryland was denied by that Court on December 20, 1979 on the basis that there had been no showing that review by certiorari was desirable and in the public interest.

OPINIONS

The original decision of the Maryland Court of Special Appeals decided on October 18, 1979 is included herein as Appendix A. The denial of the petition for writ of certiorari by the Maryland Court of Appeals is included herein as Appendix B. An excerpt from Petitioners' Brief in the Court of Special Appeals raising the Federal question is included in Appendix C.

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari is grounded on 28 US Code Section 1254.

QUESTION PRESENTED

DOES THE MARYLAND MORTGAGE FORECLOSURE PROCEDURE CONDUCTED UNDER A POWER OF SALE INVOLVE STATE ACTION AND THEREBY DEPRIVE MORTGAGORS OF THEIR DUE PROCESS RIGHTS WHEN SUCH PROCEDURE REQUIRES DOCKETING OF SUIT PRIOR

TO ADVERTISING MORTGAGORS' PROPERTY FOR SALE, BUT FAILS TO REQUIRE ACTUAL NOTICE OF THE FORECLOSURE SUIT TO BE SERVED UPON MORTGAGORS, FAILS TO REQUIRE A HEARING PRIOR TO SALE, AFFORDS NO POST-SALE RIGHT OF REDEMPTION TO MORTGAGORS AND PLACES THE POST-SALE BURDEN OF PROOF AS TO THE INVALIDITY OF THE SALE UPON MORTGAGORS?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment, Federal Constitution
Maryland Declaration of Rights Article 23
Maryland Rules of Procedure W-70 - W-76
Maryland Rules of Procedure BR Rules
Maryland Rules of Procedure Rule 625
Maryland Constitution Article 23

STATEMENT OF CASE

On April 4, 1977, a foreclosure proceeding was filed in the Circuit Court for Montgomery County, Maryland. On May 9, 1977 one of the petitioners, *pro se,* moved to enjoin the sale which was denied by a chancellor in his chambers without a hearing in open court. Later that day, petitioners' residence in Bethesda, Maryland was sold at foreclosure for $140,000.00. Petitioners filed exceptions to the sale. On February 2, 1978, the Court acting, without a hearing, upon a consent order executed by one of petitioners, who acted for

herself and purportedly as attorney in fact for her husband ratified the foreclosure sale, which was premised on the purchaser settling on the sale within five days after ratification. When the purchaser failed to settle on the sale for a period of four months following ratification, petitioners renewed their exceptions and challenged the constitutionality of the Maryland foreclosure procedure as it was applied to them. On December 28 and 29, 1978, the Court required petitioners to prove fraud, mistake or irregularity to reopen the February 2, 1978 Court Order held that petitioners failed to meet this burden and that the Maryland foreclosure procedure was constitutional. On October 18, 1979 the Maryland Court of Special Appeals affirmed the decision of the lower court. The Court of Appeals of Maryland denied certiorari December 20, 1979.

STATEMENT OF FACTS

On October 25, 1974, petitioners executed a deed of trust for $125,000.00 and conveyed their property to a trustee with a power to sell it upon default. The provision in the deed of trust provided:

> "IN TRUST, to permit the borrower, his heirs or assigns to use and occupy said realty until default be made in any of the covenants hereof, and, upon such default, and by the request of the Association, to sell said realty, or any part thereof, at public auction in such manner, at such time and place, upon such terms and conditions, and after such previous advertisement as the said trustee may deem best for the interest of all concerned. . ."

On April 4, 1977, substitute trustees docketed foreclosure suit in the Circuit Court for Montgomery County,

Maryland which pursuant to Maryland law was a condition precedent to advertising the foreclosure sale and the foreclosure sale itself. The property was advertised in a local newspaper for three weeks prior to the sale scheduled for May 9, 1977. On the morning of the sale, petitioner, Henry E. Billingsley, filed an injunction *pro se* to stop the sale which asserted that the lender had agreed to accept a portion of the arrearages to stop the sale. The chancellor afforded him no hearing in open court and denied his injunction in Chambers. The sale was conducted on that date and brought a price of $140,000.00. No summons was sent to petitioners prior to the sale giving them actual notice of the sale and an opportunity to be heard in open court prior to losing their property at foreclosure. Petitioner Henry E. Billingsley had actual knowledge of the sale and foreclosure proceeding. Ann M. Billingsley had no actual notice of the sale and learned of it some 6 months after it was held. After the sale, petitioner, Henry E. Billingsley, filed exceptions to the sale which alleged breach of agreement by the lender to accept a tender of a portion of the arrearages to stop the foreclosure, alleged insufficient purchase price, and such other reasons as were to be shown upon a hearing on the exceptions. In November, 1977 prior to any hearing on his exceptions he became completely paralyzed. Ann M. Billingsley at this time learned for the first time that her property had been sold at foreclosure.

On February 2, 1978, the Court signed an order withdrawing the exceptions which had as its basis the consent of Ann M. Billingsley to withdraw the exceptions for herself and signed by her purporting to act as attorney in fact for her husband to withdraw exceptions filed by him. At no time was there a showing the petitioners knowingly, voluntarily, and intelligently executed the consent order which had the effect

of eliminating the hearing on their exceptions to the foreclosure. The advertised terms of foreclosure, which the Court approved in its ratification order, called for the purchaser to pay the balance of the purchase price within five days of final ratification of the foreclosure sale. On June 26, 1978, when the purchaser still had not paid the purchase price, both petitioners renewed their exceptions to the foreclosure sale and challenged the Maryland foreclosure procedure on the basis that it violated the 14th Amendment as applied to the facts in their case. The trial court on December 28 and 29, 1978 heard evidence offered by petitioners but sharply limited it to what it considered to amount to fraud, mistake or irregularity. Although placing the burden upon petitioners to show fraud, mistake or irregularity, the trial court refused to allow petitioners to present evidence concerning the pre-foreclosure sale promise of the bank to accept a portion of the arrearages to stop the sale. The trial court refused to allow petitioners to present evidence that the trustees' action in extending the time for paying the purchase price by the purchaser following ratification of the sale, in contradiction to the advertised terms of sale, operated as a fraud on petitioners. The Court of Special Appeals of Maryland in its review of the record of the case concluded there was no unfairness or collusion in the making of the sale, but this conclusion completely overlooked the rulings of the trial court in excluding and refusing to consider this evidence.

The Court of Appeals of Maryland in denying the petitioners' petition for writ of certiorari made no comment as to the issues raised by petitioners, but by its actions affirmed the constitutionality of the Maryland foreclosure procedure as applied to the facts of this case.

ARGUMENT

The issue of whether a power for sale foreclosure is sufficient waiver of rights to due process such that a party can be deprived of his property by state action without a hearing and without actual notice of a foreclosure proceeding is ripe for a full airing before this Court. The Maryland foreclosure procedure recognizes and requires a right to a summons and hearing where no power of sale is contained in a deed of trust. Maryland Rules of Procedure Rule W-73. No right of redemption is afforded the mortgagors after foreclosure sale.

The unfortunate aspect of the power of sale provision is that it does not warn a borrower that he gives up his due process rights to a hearing which would require the creditor at a minimum to show the existence of a default and the opportunity to be heard before the borrowers' property is taken. Under Maryland law, all rights of the mortgagor to the property cease to exist on the day of the sale, *Butler vs. Daum,* 245 Md. 447, 226 A.2d 261 (1967), *Union Trust Co. vs. Biggs,* 153 Md. 50, 137 A. 509 (1927), the only exception being if the mortgagors show satisfactory proof that the sale should be set aside by overcoming the "presumption of the validity of the sale". *Butler vs. Daum, supra,* at p. 451. *Union Trust Co. vs. Biggs, supra.*

The requirement of Maryland foreclosure procedure that the foreclosure proceeding be docketed in the Court before advertisement (Maryland Rule W-74 a 2(a)) is sufficient governmental involvement to establish the foreclosure procedure is subject to the constraints of the due process clause of the 14th Amendment of the Constitution of the United States. *Moose Lodge No. 107 vs. Irvis,* 407 U.S. 163, 172, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972), *Shelly vs. Kraemer,* 334 U.S. 1, 13 S. Ct. 836, 92 L.Ed. 1161 (1948).

Petitioners recognize that this Court has permitted the inclusion of confession of judgment clauses in debt instruments and has held such inclusion was not unconstitutional *per se, D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 92 S. Ct. 775, 31 L.Ed.2d 124 (1972) and *Swarb vs. Lennox,* 405 U.S. 191, 92 S. Ct. 767, 31 L.Ed.2d 138 (1972), but the fact potential due process rights might be waived through devices such as confession of judgment clauses or powers of sale does not preclude a finding that such a waiver was ineffective or unconstitutional in the instant case. *Bryant vs. Jefferson Federal Savings and Loan Association,* 509 F.2d 511 (1974) (U.S. Court of Appeals, District of Columbia Circuit), particularly when significant state involvement in the foreclosure procedure is present and no express waiver is shown. This distinguishes the instant case from the line of cases finding no denial of due process under power of sale foreclosures where there was found to be no state involvement. (See for example *Barrera vs. Security Building and Investment Corporation,* 519 F.2d 1166 (1975), (Texas), *Levine vs. Stein,* 560 F.2d 1175 (1977) (Virginia). State involvement and denial of due process has been found to exist, necessitating vacation of the foreclosure proceeding in *Turner vs. Blackburn,* 389 F. Supp. 120 (1975) (North Carolina).

In a 1973 case, the Federal District Court of Maryland, had before it the constitutionality of the Maryland foreclosure procedure. *Fisher vs. Federal National Mortgage Association,* 360 F. Supp. 207 (Maryland). That court found the State of Maryland plays a very real and substantial role in power of sale mortgage foreclosure proceedings. It is this involvement that brings this case under *Fuentes vs. Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556, (1972), *D.H. Overmyer & Co. vs. Frick Co.,* 405 U.S. 174,

92 S. Ct. 775, 31 L.Ed.2d 124 (1972); *Swarb vs. Lennox,* 405 U.S. 191, 92 S. Ct. 767, 31 L.Ed.2d 138 (1972); *Sniadach vs. Family Finance Corporation,* 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969).

It is time for this court to reexamine its statement in *Scott vs. Paisley,* 271 U.S. 632, 635, 46 S. Ct. 591, 592, 70 L.Ed. 1123, 1125 (1926) that "the validity of such a contractual power of sale is unquestionable" in the light of due process rights protected by the 14th Amendment, particularly as applied to the facts of this case, as enunciated by *Turner vs. Blackburn,* 389 F. Supp. 1250 (1975), requiring notice by means reasonably calculated to inform the mortgagors of the foreclosure and an opportunity for a meaningful hearing, namely a showing before a neutral officer that the mortgagors are in default and an opportunity for the mortgagors to rebut and defend the charges. *Turner, supra,* holds that a hearing *prior* to foreclosure is essential and required by *Fuentes vs. Shevin, supra.* Under the facts of the instant case, petitioners were not afforded any hearing prior to foreclosure. The hearings after the foreclosure were a *fait accompli,* for by then they had the burden of proof to show the sale was unfair or invalid, which as state law prescribes is "presumed to be valid". (*Butler vs. Daum, supra*). *Turner, supra,* requires that there be an express waiver of due process rights before the mortgagors can be deprived of their property rights. Under the facts of the instant case, there is no express waiver of due process rights. There is no warning in the deed of trust that the power of sale eliminates the right to a hearing or notice before the property is sold. This court should examine the facts in this case to determine whether such rights were "voluntarily, intelligently and knowingly" waived. (The test set forth in *D.H. Overmyer vs. Frick, supra*). The unequal bargaining power of the parties is

important. There has been no clear waiver of constitutional rights in the instant case. This court must indulge every reasonable presumption against waiver. *Aetna Insurance Co. vs. Kennedy,* 301 U.S. 389, 57 S. Ct. 809, 81 L.Ed. 1177 (1937).

The Maryland foreclosure procedure in this case has denied petitioners the right to have a summons served on them before a foreclosure sale; the right to a meaningful hearing before or after the sale; and the right to a meaningful review of the action of the trial court.

In sum, under the facts of this case, petitioners have been denied their right to due process by the Maryland foreclosure procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted and the judgment in this case be reviewed.

Respectfully submitted,

CARLTON M. GREEN
5303 Baltimore Avenue
Hyattsville, Md. 20781
Attorney for Petitioners

APPENDIX A

Henry E. BILLINGSLEY et ux.

v.

Thomas S. LAWSON and J. Edward White, Substitute Trustees, et al.

Henry E. BILLINGSLEY et ux.

v.

Thomas S. LAWSON and J. Edward White, Substitute Trustees, et al.

Nos. 273, 459 (Consolidated).

Court of Special Appeals of Maryland.

Oct. 18, 1979.

Proceeding was instituted on motion of mortgagors to vacate final order of ratification of foreclosure sale. The Circuit Court, Montgomery County, Joseph M. Mathias, J., denied motion, and appeal by mortgagors was combined with their appeal from a further order of the court, John J. Mitchell, J., requiring mortgagors to pose a supersedeas bond to preclude execution of writ of possession obtained by trustees. The Court of Special Appeals, Liss, J., held that: (1) alleged promise by agent of bank that foreclosure sale of property would be cancelled if a certain amount was paid by mortgagors prior to date of sale, even if true, was not an act of extrinsic fraud and, when viewed in context of fact that consent decree by which mortgagors agreed to withdraw their exceptions to foreclosure was entered almost a year

later, was not a basis for vacating final order of ratification of foreclosure sale, and (2) foreclosure procedure which called for docketing of suit by trustees, submission of affidavit of indebtedness, and filing of bond, which called for giving of actual notice to mortgagors and an opportunity to challenge validity of sale, and which required a judicial officer to ratify sale prior to final passing of title was not unconstitutional as depriving mortgagors of due process.

Affirmed.

Carlton M. Green, Hyattsville, for appellants.

John C. Joyce, Hyattsville and Richard O. Duvall, Washington, D. C., with whom were Harry M. Stern and Duckett, Orem, Christie & Beckett, Hyattsville and Dunnells, Duvall, Bennett & Porter, Washington, D. C., on the brief, for appellees.

Argued before LISS, COUCH and MacDANIEL, JJ.

LISS, Judge.

Henry E. Billingsley and Ann Billingsley, his wife, appellants, applied to Jefferson Federal Savings and Loan Association of Washington, D. C. (hereinafter Jefferson) to obtain refinancing of an existing loan on their residence in Bethesda, Maryland for the purpose of paying certain business expenses and an existing second trust on their property. On October 25, 1974, the appellants executed a promissory note in the amount of $125,000.00 secured by a deed of trust on the residence to Suburban Trust Company, Trustee. By the terms of the note, the appellants agreed to pay the principal sum plus interest at the rate of ten per cent per annum, the sums payable in monthly installments. The note provided that at the option of Jefferson in the event of a default the entire debt, plus interest, advances and charges would become due and payable.

On November 17, 1976, the appellants received a letter by registered mail which advised them that the note was then $4,328.74 in arrears; that payment of the overdue amount was requested by November 29, 1976; and that foreclosure was a possibility if the payment was not received. The appellants were again advised of their delinquency on February 8, 1977. When payment was not forthcoming, Jefferson instructed Suburban Trust to proceed with a foreclosure proceeding which was filed in the Circuit Court for Montgomery County on April 7, 1977. Thomas S. Lawson and J. Edward White were appointed as substitute trustees on March 4, 1977; and the foreclosure suit was captioned in their names. They appear in these proceedings as appellees.

On the same date that the foreclosure suit was docketed, counsel mailed the appellants a copy of the foreclosure advertisement proposed to be published during the ensuing weeks. The advertisement was published in the "Suburban Record" on April 22, 29, and May 6, 1977. Another copy of the advertisement was mailed to the appellants by counsel for the trustees on April 30, 1977. The record shows that the advertisement conformed to the requirements of law by describing the property and improvements, the terms of sale, and the location in the Montgomery County Land Records of the deed of trust containing a metes and bounds description.

On May 9, 1977, the day scheduled for sale, the appellants *pro se* moved the Circuit Court to enjoin the sale. A proffer was made that Mr. Billingsley had been led to believe on the Friday preceding the sale that the sale would be stopped if he tendered $5,000.00 prior to the sale. Acting on this representation, appellants obtained a $5,000.00 cashier's check and tendered it to the substitute trustees on

the morning of the sale, but the substitute trustees refused to accept the check or stop the sale. The chancellor denied the motion for injunction to stop the sale without a formal hearing on the ground that the "mortgagor has not paid the remaining balance under the secured indebtedness but has only offered to make payments current." The sale thereupon proceeded and the property was purchased by the second trust holder (Jefferson) for $140,000.00. Appellants filed exceptions to the sale and a hearing was set for November 29, 1977. That hearing was continued by the trial court when Mrs. Billingsley presented a physician's certificate reciting that Mr. Billingsley was in critical condition completely paralyzed as a result of the Guillain-Barre Syndrome which had caused him to be confined to the National Naval Medical Center.

On February 2, 1978, the chancellor (Latham, J.) was presented with a consent order executed by Ann Billingsley for herself and as attorney in fact for Henry Billingsley to which was attached a general power of attorney appointing Mrs. Billingsley to act on Mr. Billingsley's behalf. The order presented to the chancellor indicated that the Billingsleys had agreed to withdraw their exceptions to the sale and had consented to its final ratification.

On June 26, 1978, Henry Billingsley filed a petition to set aside the February 2, 1978 consent order (Mrs. Billingsley was not a party in this petition). Also on June 26, 1978, both appellants filed a new set of exceptions to the foreclosure sale that raised issues not in the original exceptions. Additionally, they filed a motion to set aside the foreclosure sale and a petition to declare the deed of trust null and void.

Trial was had on December 28 and 29, 1978 before Judge Mathias in the Circuit Court for Montgomery County. Appellants initially moved that Judge Mathias remove

himself from the case contending that he had previously violated their constitutional rights and that the chancellor might be liable to the appellants if he ruled against them. The trial judge appropriately denied this frivolous motion and the hearing then proceeded.

In their various exceptions and motions, the Billingsleys, in hunter's parlance, shot mustard seed in an attempt to kill a stag. They contended that their grounds for vacating the February 2, 1978 consent order included the fact that the power of attorney was null and void; that Mr. Billingsley was mentally incompetent at the time he gave his wife the power of attorney upon which she based her authority to withdraw the exceptions to the sale and consent to the ratification; that the February 2, 1978 order was entered without notice to him and without his consent and its entry denied him due process; that Mrs. Billingsley had signed while she was under a severe mental strain, believing her huband was dying; that her consent was not voluntary and that her actions were a nullity when she purported to act for Mr. Billingsley.

In support of their exceptions to the sale and the motion to set it aside, they used the same tactics, alleging the advertisement of sale did not satisfy Maryland Rule W74 a 2(b) because it only ran for 17 days, not 21 days; that the Maryland foreclosure law is unconstitutional; that no settlement occurred within five days of final ratification; that the injunction was improperly denied; that the loan had not been properly accelerated; that the power of sale was improperly exercised because there had been no default; that the deed of trust was void because the affidavit of disbursement was irregular; and that the forfeiture of the appellants' property violated the Soldiers' and Sailors' Civil Relief Act. Appellants also filed on the same date a Petition

to Declare the Deed of Trust Null and Void on the basis that the affidavit of disbursement was irregular and usurious.

Appellees, in response to appellants' motion to vacate the final order of ratification of the foreclosure sale, entered by the chancellor pursuant to the consent order of February 2, 1978, contended that the order was enrolled and as required by Rule 625 a could be vacated only by proof that the order of ratification was the product of fraud, mistake, or irregularity.

After a two-day hearing that included extensive testimony and legal argument, Judge Mathias signed an order dated the 3rd day of January, 1979 in which he found "that the petitioners filed to produce sufficient evidence of fraud, irregularity or mistake under Maryland Rule 625 a to convince the court to vacate the enrolled consent order of February 2, 1978." He thereupon denied the petition to vacate the consent order; the petition to declare the deed of trust null and void; the exceptions to the foreclosure sale; and the motion to set aside the foreclosure sale. Appellants promptly noted an appeal from Judge Mathias' order which in this Court became Case No. 273 of the September Term of 1979. While that appeal was pending, appellees sought and obtained a writ of possession of the property involved and an order requiring the appellants to post a supersedeas bond in the amount of $250,000.00 to preclude the execution of the writ of possession. An appeal from that order to this Court was noted and that case became No. 459 of the September Term of 1979. The appeals in both cases have been consolidated. Mercifully, the questions to be decided by this appeal have been narrowed somewhat to the five issues raised in appellants' brief. They are:

1. Whether the appellants offered sufficient proof of fraud, mistake and irregularity to require the chancellor to

vacate the February 2, 1978 consent order and to set aside the foreclosure sale?

2. Whether the trial court excluded relevant evidence at the hearing on the appellants' motions?

3. Whether the Maryland foreclosure procedure is unconstitutional and thereby denied appellants due process upon the facts in this case?

4. Whether the trial judge erred by granting the writ of possession in this case?

5. Whether the trial court erred when it ordered the appellants to file a supersedeas bond, and whether the failure of the appellants to file such a bond rendered the appeal as to the writ of possession moot?

1. and 2.

Maryland Rule 625 a which governs this case states:

> For a period of thirty days after the entry of a judgment, or thereafter pursuant to motion filed within such period, the court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in case of fraud, mistake or irregularity.

It is clear that this rule encompasses final orders of ratification in foreclosure cases. *Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 347 A.2d 837 (1975).

[1,2] As the consent order of ratification was signed on February 2, 1978 and the motion to vacate on June 26, 1978, the appellants must show "clear and convincing proof" of fraud, mistake or irregularity in order to be entitled to relief under Rule 625 a. *See Accrocco v. Splawn*, 264 Md. 527, 532, 287 A.2d 275 (1972). Furthermore, "[T]he

power of the court to revise and control an enrolled judgment is no longer discretionary." *Ventresca v. Weaver Bros.*, 266 Md. 398, 403-04, 292 A.2d 656, 659 (1972).

[3] The Court of Appeals has said that a litigant seeking to set aside an enrolled decree must prove extrinsic fraud and not intrinsic fraud. The Court explained the distinction between these two types of fraud in *Schwartz v. Merchants Mortgage Co.*, 272 Md. 305, 308-09, 322 A.2d 544, 546 (1974) when it said:

> [A]n enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are *"intrinsic"* to the trial of the case itself. Underlying this long settled rule is the principle that, once parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public policy of this State demands that there be an end to that litigation . . . This policy favoring finality and conclusiveness can be outweighed only by a showing "that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." [Citation omitted.]

[4] Fraud is extrinsic when it actually prevents an adversarial trial but it is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, that truth was distorted by the complained of fraud. *Maryland Steel Co. v. Marney,* 91 Md. 360, 46 A. 1077 (1900).

[5,6] Appellants argue that the fraud in this case included the alleged promise by the agent of the bank that if $5,000.00

were paid prior to the date of sale, the foreclosure sale would be cancelled. This testimony was denied under oath by the bank's representative. The allegation, even if true, is not an act of extrinsic fraud, and when viewed in the proper time context, *i.e.*, that the alleged false promise was made on May 5, 1977 and the consent decree entered almost a year later, then the complained of conduct clearly does not justify vacating of the enrolled decree. Nor would the alleged failure of the purchaser at the sale to comply strictly with the terms of sale amount to such a fraudulent act as would require the ratification order to be vacated. We find nothing in the record which establishes either intrinsic or extrinsic fraud.

The appellants next contend that there were five "irregularities" in the foreclosure proceedings which require reversal of the lower court's order. They are: the sufficiency of the advertisement; the acknowledgment on the power of attorney; the fact that the deed to the property was not conveyed within five (5) days after ratification of the sale; Mr. Billingley's alleged lack of mental capacity when the power of attorney was granted, and the duress which Mrs. Billingsley was under when she consented to the February 2, 1978 decree.

[7] None of these circumstances amounts to the type of irregularity contemplated by Maryland Rule 625 a. The Court of Appeals in *Weitz v. MacKenzie,* 273 Md. 628, 630-31, 331 A.2d 291, 293 (1975) defined an "irregularity" as follows:

> Under our cases, an irregularity which will permit a court to exercise revisory powers over an enrolled judgment has been consistently defined as the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done [citations omitted.] As a consequence,

> irregularity, in the contemplation of the Rule, usually means irregularity of process or procedure [citations omitted], and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged. [citations omitted.]

It has been held that the dismissal of a case without giving notice as required by the Maryland Rules, *Mutual Benefit Society of Baltimore, Inc. v. Haywood,* 257 Md. 538, 263 A.2d 868 (1970), and the failure of a clerk to send the required notice upon the entry of a default judgment, *Maryland Lumber v. Savoy,* ____ Md. ____, 405 A.2d 741 (1979); *Calvert Fire Ins. Co. v. Reick,* 39 Md.App. 620, 387 A.2d 789 (1978), are the types of irregularities contemplated by Rule 625 a. Appellants have alleged no such irregularity of court process or court procedure.

[8] Appellants offer as proof of irregularity their contention that the advertisement of the foreclosure sale did not run for three successive weeks as required by Rule W74 a 2(b)(i) which states: "For the sale of real estate or chattels real—at least once in each week for three successive weeks, the first such publication to be not less than fifteen days prior to sale and the last such publication to be not more than one week prior to sale." Appellants contend that this section means the notice of sale must have run for at least twenty-one days. They offer in support of their contention, *Fleisher v. Grice,* 245 Md. 248, 226 A.2d 153 (1967). Our own reading of that case convinces us that it is factually inapposite to the case *sub judice.* Nor do we find support for appellant's contention in *Byrd v. Day,* 138 Md. 442, 114 A. 486 (1921) which interpreted a statute with language clearly distinguishable from the rule we here consider. We conclude that the advertisement as required by the rule was published

once in each of three successive weeks with the first publication not less than fifteen days prior to sale and the last not more than one week prior to sale. Finally, even if we assume, *arguendo,* that appellees did not comply strictly with Rule W74 a2(b)(i) this "irregularity," if any, is not one of those requiring a remedy pursuant to Rule 625 a.

[9] Appellants next attack the acknowledgment on the power of attorney executed by Mr. Billingsley. The power of attorney was admitted into evidence without objection in the trial below and the issue of the validity of the affidavit was not raised at that time. It may not be raised for the first time on appeal. Rule 1085.

[10] Appellants' contention that the appellees and the subsequent purchasers of the property failed to comply strictly with the terms of sale has no merit. As the judge below stated: "Once the sale was ratified and confirmed, they had the authority to make such changes or modifications as they felt were proper." None of the modifications agreed upon by the parties would go to the validity of the sale as originally made, particularly as there is no indication the modifications in any way affected the appellant's liability to appellee Jefferson.

[11] Appellants cite as their final evidence of "irregularity" their contention that Henry Billingsley lacked sufficient mental capacity to execute the power of attorney which accompanied the consent to the ratification order of February 2, 1978. While it is conceded that Mr. Billingsley was, in fact, in a horrendous physical condition at the time of the execution of the power of attorney, those difficulties did not affect his mental capacity. *See Robinson v. Robinson,* 178 Md. 623, 16 A.2d 854 (1940); *Mead v. Gilbert,* 170 Md. 592, 185 A. 668 (1936); *Mobley v. Mobley,* 149 Md.

401, 131 A. 770 (1926). The chancellor concluded, "the medical evidence before me is overwhelming that he was competent and knew what he was doing" when the appellant executed the power of attorney. That conclusion on the facts may not be set aside unless we find the chancellor's conclusion clearly erroneous, which we do not. Rule 1086.

[12] Appellants also argue that Mrs. Billingsley executed the consent decree under duress and that this amounted to an "irregularity." Again we find no merit to the argument. The record clearly demonstrates that there was no evidence of any wrongful acts by the trustees which induced the execution of the consent. It is significant that Mrs. Billingsley did not join in the petition to vacate the consent decree.[1] *See Eckstein v. Eckstein*, 38 Md.App. 506, 379 A.2d 757 (1978); *Bell v. Bell*, 38 Md.App. 10, 379 A.2d 419 (1977).

[13] Appellants next attack the Maryland foreclosure rules which are found in Rules W70 through W81. They urge that the Maryland foreclosure procedure is unconstitutional which caused them to be deprived of due process of the law under the Fourteenth Amendment to the United States Constitution and Article 23 of the Maryland Declaration of Rights. The sale in this case was conducted pursuant to the power of sale granted in the deed of trust as authorized by Rule W72 c and e which eliminates the requirements of Rule W73. Rule W73 provides for summons, hearing, and an initial finding by the chancellor that a default has occurred. Appellants cite no Maryland authority which even remotely supports their attack on the constitutionality of the rules of foreclosure.

[1]At argument counsel for appellants called to our attention three recent cases which he contended were helpful to his position. We have carefully considered them and find them inapposite to appellants' contentions.

The Federal District Court of Maryland refused to enjoin a Maryland foreclosure proceeding because, in its opinion, the debtors had ample opportunity to have their claims litigated in the state courts. In *Fisher v. Federal National Mortgage Assn.*, 360 F.Supp. 207 (D.C.Md.1973), the Court in discussing the Maryland foreclosure rules said:

> Under Maryland law, an action to foreclose a mortgage containing a power of sale is commenced by the filing, in an equity court of the county where the mortgaged property is located, of an order to docket together with the mortgage as an exhibit. Rule W72 c. Jurisdiction is conferred on the state court at the time of the docketing of the action. Rule W72 e. Other provisions of the Rules indicate that the state equity court plays a very real and substantial role in mortgage foreclosure proceedings. Before the sale is made, an approved bond must be filed in the court in which the action was filed. Rule W74 a. A mortgagor may seek an injunction to stay the sale. Rule W76 b. More significantly, even after the sale has been made, it must be ratified by the court. Rules W74 e and BR 6 b(2) [sic]. Since Maryland law provides that a mortgage foreclosure sale is subject to the approval of the court, such a sale does not pass title to the property until ratified by the court. *Plaza Corp. v. Alban Tractor Co., Inc.*, 219 Md. 570, 578, 151 A.2d 170 (1958).
>
> Under Maryland foreclosure procedures, plaintiffs are afforded two separate opportunities in which they may challenge in a state court the legality of the foreclosure. First, under Rule W76 b, plaintiffs may move prior to sale to enjoin the foreclosure. Secondly, after the sale but before ratification, plaintiffs have the opportunity to file objections to the sale. Rules W74 e

and BR 6 b(2) [sic]. The equity court has full power to hear and determine all objections which may be filed against the sale. *Wilson Bros. v. Cooey,* 251 Md. 350, 360, 247 A.2d 395 (1968). When an equity court has once assumed jurisdiction, it will retain its jurisdiction in order to settle all questions which might arise out of the subject in controversy. *Stater v. Dulany,* 236 Md. 399, 404, 204 A.2d 71 (1964); *Ledford Const. Co. v. Smith,* 231 Md. 596, 600, 191 A.2d 587 (1963). [footnotes omitted.] [*Id.* at 210-11.]

In the present case, it is clear that the trustees complied with the requirements of the Maryland Rules. The suit was docketed pursuant to Rule W72 c; an affidavit of indebtedness was submitted to the court under Rule W72 d; and a bond was filed to protect the debtor's interest pursuant to Rule W74 a. These actions amounted to a sufficient "preliminary judicial scrutiny" of the mortgage. Under Rule W76 b, Mr. Billingsley, having received actual notice prior to the sale, sought to enjoin the foreclosure, giving as his reason the alleged promise to call off the sale if he brought the account up to date. The chancellor chose to consider the petition by an in-chambers conference and had before him all the facts which Mr. Billingsley now contends would have justified enjoining the foreclosure sale. The chancellor refused to do so for the reason we have heretofore mentioned. The appellants had a second opportunity to challenge the validity of the sale under Rules W74e and BR6 b 2 which provide for the method of ratifying a foreclosure sale. Appellants filed exceptions to the ratification of the sale, but on February 2, 1978 they withdrew their exceptions and consented to the decree of final ratification. At that point, they still had thirty days to appeal to the court's discretion

until enrollment of the decree but took no action until some five months after final enrollment. To suggest a lack of due process under such circumstances borders on the frivolous.

The appellants' principal legal reliance in their constitutional attack on the Maryland foreclosure rules is found in *Turner v. Blackburn,* 389 F.Supp. 1250 (W.D.N.C. 1975), but our reading of this case leads us to the conclusion that it is totally inapplicable not only because of the substantial differences between the provisions of the Maryland Rules and the North Carolina statute but also because of the factual differences in the cases. In *Turner, supra,* the mortgagor received no notice of the foreclosure sale of her house until eviction proceedings had been filed against her. The District Court in that case held that the lack of any notice requirement and the unavailability of a hearing before the taking of the mortgagor's property interest amounted to a constitutional lack of due process. Further, the North Carolina statute did not require an affidavit of indebtedness; a bond to be filed prior to foreclosure; nor did it require a judicial officer to ratify the sale. By the terms of that statute, the clerk of court exercised supervisory capacity over the foreclosure proceedings. Even a cursory reading of the W Rules makes it obvious that our rules in no way resemble the North Carolina statute which was held to be unconstitutional. Finally, under Maryland procedure, contrary to that of North Carolina, there is no final passing of title until the sale is finally ratified by the court.

After a thorough consideration of the W Rules, we are convinced they meet the due process requirements under the Fourteenth Amendment to the Constitution and Article 23 of the Maryland Constitution.

4. and 5.

The record in this proceeding indicates that subsequent to the purchase of this property at the foreclosure sale by the holder of the second lien that it sold the property by contract to Ralph D. Kaiser Co., Inc. which has joined in this proceeding as a party in interest.

[14] Appellants, as a last gasp, contend that the chancellor below erred in issuing a writ of possession under Rule 637 directing them to surrender the property and they claim further error on the part of the chancellor for his requiring them to file a $250,000.00 supersedeas bond under Rule 1020 for the protection of the trustees and purchasers. No such bond has been filed by the appellants.

Appellants allege that no sale to the Kaiser Co. ever was consummated. They cite as authority *Mizen v. Thomas,* 156 Md. 313, 144 A. 479 (1928), but again, that case is clearly distinguishable from the case presently under consideration. In *Mizen, supra,* the controversy involved a purchaser who was irresponsible and unable to complete the sale, which is plainly not the case here. Appellants also contend that as the purchase price has not been paid and no deed has been executed to the Kaiser Co., no writ of possession should have been issued. The Court of Appeals has made it clear as to what the status is of the various parties to a foreclosure sale in *Union Trust Co. v. Biggs,* 153 Md. 50, 55-56, 137 A. 509, 512 (1927) when it said:

> [T]he sale of the mortgaged premises under the power of sale in the mortgage deed virtually foreclosed the mortgage and divested all rights of redemption which had remained in the mortgagor until the sale. [Citations omitted.] After the foreclosure sale the purchaser had the equitable interest in the land commensurate with that

> conveyed by the mortgage deed, and he was entitled to the legal title upon the final ratification of the sale by the court and the payment of the purchase money.... So the whole beneficial ownership or estate of both the assignee and the mortgagor had passed from the land into the obligation of the purchaser to pay. In short, after the sale, equity regarded the property in the land as in the buyer, and the property or the price as in the assignee and mortgagor.

Further, when we note that by the time the chancellor signed the writ of possession in this case more than two years from the date of the original sale had passed and that the appellants had been in possession of the premises during that entire time, we conclude that the chancellor correctly exercised the discretion vested in him by Rule 637.

[15] The failure of the appellants to file the supersedeas bond as ordered by the court does not *per se* operate to invalidate the appeal, but it does render this portion of the present case moot because the rights of the bona fide purchaser cannot be affected by a reversal of the lower court's decision. *Leisure Campground v. Leisure Estates,* 280 Md. 220, 372 A.2d 595 (1977); *Onderdonk v. Onderdonk,* 21 Md.App. 621, 320 A.2d 585 (1974). Appellants attempt to avoid the holding in these cases by suggesting that there was unfairness or collusion in making of the sale. From our perusal of the record we find no such evidence.

DECREE AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

APPENDIX B

HENRY E. BILLINGSLEY
et ux.

v.

THOMAS S. LAWSON
and J. EDWARD WHITE,
Substitute Trustees, et al.

In the
Court of Appeals
of Maryland

Petition Docket No. 359
September Term, 1979
(Nos. 273 & 459 September Term, 1979
Court of Special Appeals)

ORDER

Under consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: December 20, 1979.

APPENDIX C

ARGUMENT

III

THE MARYLAND FORECLOSURE LAW IS UNCONSTITUTIONAL AND APPELLANTS WERE DENIED DUE PROCESS UNDER THE FACTS OF THIS CASE.

The foreclosure sale was conducted pursuant to the power of sale in the deed of trust, as authorized by Maryland Rule W-72 (c) and (e), which eliminate the requirements of an equitable foreclosure pursuant to Maryland Rule W-73 which requires summons, hearing and initial finding by the Court that a default has occurred. Under Maryland procedure no right of redemption is afforded following the sale, in fact all rights of the mortgagors allegedly ceased to exist on the day of sale, *Butler v. Daum,* 245 Md. 447 (1967), *Union Trust Co. v. Biggs,* 153 Md 50 (1927), *Berry v. Skinner,* 30 Md 567 (1869), the only exception being if the mortgagors show satisfactory proof before ratification that the sale should be set aside. This is true when the mortgagors had no notice of the sale. In other words, the burden is always on the mortgagors to stop the ratification after they have been deprived of their equitable title, *Union Trust Co. v. Biggs, supra,* and must overcome what the Maryland cases describe as "the presumption of the validity of the sale". See *Butler v. Daum, supra* at 451, 453. The Maryland Court of Appeals as recently as 1967 ruled that no

personal notice is necessary in a foreclosure, so long as the advertisement of sale appeared in a newspaper under Rule W-74, *Butler v. Daum, supra* at 451, but the Rules were revised in 1970 to require a registered letter be sent under Rule W-74 to the last known address of the mortgagors, informing them of the time and place of the sale. The Rules have also been amended under Rule W-74 a 2 c (a) which requires docketing of suit prior to advertisement.

In this case Henry Billingsley had actual knowledge prior to the sale and sought an injunction, claiming *inter alia* there was no default at the time of foreclosure. The court, Mathias J., denied this injunction in chambers, without a hearing. Ann Billingsley had no personal notice or summons of the sale and did not learn of it until her husband became seriously ill, when his exceptions were due to be heard. The sale was conducted pursuant to a "consensual" power of sale.

The power of sale foreclosure procedure coupled with the requirement of docketing the case before advertisement makes foreclosure sales judicial sales, involving state action, such that Maryland, when it requires no actual notice by summons prior to the sale, has deprived the mortgagors of their property, i.e. the equitable title, without due process of law in violation of the Fourteenth Amendment of the United States Constitution. No Maryland case has decided this issue.

Other jurisdictions have considered the matter and are enlightening. In *Bryant v. Jefferson Federal Savings and Loan Association,* 509 F.2d 511 (1974), the U.S. Court of Appeals for the District of Columbia found no governmental involvement used to deprive a person of his property under the identical power of sale which appears in the deed of trust in this case, where, significantly, District of Columbia does

not require docketing of foreclosure prior to advertisement. The United States Court of Appeals, Fifth Circuit, in *Barrera v. Security Building and Investment Corporation,* 519 F.2d 1166 (1975), a case where property was sold under a power of sale in a deed of trust, found no state involvement, in part because no state statute created a right in mortgagees to proceed by non-judicial foreclosure. Maryland procedure, contrary to Texas procedure, under the W-Rules creates a right in mortgages to proceed by non-judicial foreclosure under a power of sale eliminating the necessity for equity foreclosures in such cases. Likewise, the Virginia foreclosure procedure has been sanctioned on the basis that there is no state involvement in the power of sale foreclosure procedure. *Levine v. Stein,* 560 F.2d 1175 (1977). Significantly, Virginia has no requirement of docketing suit prior to advertisement and no application to any court before the sale is conducted, which is contrary to the Maryland procedure.

The North Carolina foreclosure procedure under a power of sale, which is closely analogous to Maryland has been ruled unconstitutional as applied to the facts in *Turner v. Blackburn,* 389 F. Supp. 1250 (1975). North Carolina required four weeks of publication prior to a sale but no personal notice to the mortgagor. There was no condition precedent such as docketing suit prior to the sale, but the person making the sale was required to report the sale to the clerk who in turn could accept an upset bid within 10 days of the sale. In *Turner, supra* the court found state action which violated 42 USC Section 1983 (1970) and a violation of the mortgagor's 14th Amendment rights under this foreclosure procedure.

The instant case is analagous to *Turner, supra* in that: 1) The Billingsley's received no summons prior to the sale;

2) Ann Billingsley did not learn of the sale until 5 months after it occurred and had been deprived of her equitable title; 3) Henry Billingsley was denied an opportunity to be heard when he filed his Petition for Injunction prior to the sale; 4) both involve the power of sale which is not an express waiver of due process; 5) the State plays a major role in the foreclosure - in Maryland, the foreclosure can not take place without docketing suit and the trustees can not grant legal title until after final ratification by the Court - and in North Carolina, the trustee can not grant legal title until he has properly reported to the clerk and the clerk approves his report; 6) both involve deprivation of the mortgagor's home; 7) both involve an injunction hearing - in *Turner, supra,* the injunction hearing came along after the sale and deprivation of rights had occurred and in the instant case no hearing at all was held until after equitable title had been lost. What is required to afford due process is a hearing before the sale where the trustee must show the mortgage is in default and the mortgagor has an opportunity to rebut this before he is deprived of any significant property interest. Injunction hearings after the sale do not afford due process where the burden is on the mortgagor to show irreparable damage or inadequacy of price and as a condition precedent he must file a bond for full indemnification. *Turner v. Blackburn, supra* at 1259. The same can be said for the Maryland procedure allowing exceptions after the sale where the burden is upon the mortgagor to show facts or irregularities to set aside the sale, after the mortgagor has been deprived of his equitable title.

Nor can the power of sale be construed as a waiver of due process rights where it fails to even allude to the right to a hearing prior to foreclosure and the right is not disclosed on the face of the deed of trust. *Turner v. Blackburn, supra* at

1260-61. Put another way, the power of sale in this deed of trust was simply not enough to constitute a waiver by the Billingsleys of their equitable foreclosure rights afforded by the Maryland Rules, requiring a summons and hearing prior to foreclosure sale. See Maryland Rule W-73.

Turner, supra was decided after *Fisher v. Federal National Mortgage Association,* 360 F. Supp. 207 (D.C. Md 1973) which case held an injunction hearing in Maryland prior to sale afforded debtors an ample opportunity to have claims litigated prior to the foreclosure. The distinction in the instant case is that Henry Billingsley had no actual hearing prior to sale when the question of whether there was an actual default under the terms of the deed of trust was at issue. Ann Billingsley prior to the sale did not even know the loan was possibly in default, but her equitable title was deprived without notice to her when the sale took place.

The proceedings after the sale did not afford due process. By then, appellant's equitable title had been lost; they had the burden of showing the unfairness of the sale and their opportunity to avoid the sale had been lost. Nor did the December 28, 1978 hearing afford them due process, for by then they were required to limit their evidence to fraud, mistake or irregularity, which sharply limited them in their presentation of evidence.

In sum, under the facts of this case, the Maryland foreclosure procedure has denied appellants due process under the Maryland Declaration of Rights Article 23 and the Fourteenth Amendment to the United States Constitution.